

June 16, 2000

Re: 00-0219

TO ALL PARTIES OF INTEREST:

Enclosed are copies of the Memorandum and Written Decision dated June 1, 2000, the Memorandum dated June 14, 2000 and Page 10 to the Written Decision received in the Clerk's Office on June 15, 2000 from the Hearing Examiner to the Commission regarding recommended action at the Bench Session on June 7, 2000 and the Special Open Meeting on June 15, 2000.

Sincerely,

Donna M. Caton
Chief Clerk

DMC:jbm
Enclosure

Docket No: 00-0219
Bench Date: 6/15/00
Deadline: 6/15/00

MEMORANDUM

TO: The Commission

FROM: Eve Moran, Hearing Examiner

DATE: June 14, 2000

SUBJECT: 21st Century Telecom of Illinois, Inc.
-vs-
Illinois Bell Telephone Company (Ameritech Illinois)

Complaint against Illinois Bell Telephone Company (Ameritech Illinois) under Sections 13-514 and 13-515 of the Public Utilities Act, and Request for Emergency Relief pursuant to Section 13-515(e).

RECOMMENDATION: Deny Petition and Adopt Written Decision.

I. Introduction

On March 9, 2000, 21st Century Telecom of Illinois, Inc. (21st Century") filed a Complaint against Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech Illinois") pursuant to Sections 13-514 and 515 of the Public Utilities Act ("Act"). The Written Decision of the Hearing Examiner ("Written Decision") for this proceeding was issued on May 31, 2000. As required by statute, it sets out reasons for the disposition of the Complaint and ultimately concludes that 21st Century failed to meet its burden of proof on each of the two claims it pursued in this proceeding.

On June 5, 2000, 21st Century filed a Petition for Commission Review of the Hearing Examiner's Written Decision ("Petition") pursuant to Section 13-515 (d)(8). This filing attempts to fault the Written Decision on its conclusions, but the challenges it posits are neither factually realistic nor legally supportable. To be sure, this case proceeded on a "fast track" as is the nature of Section 13-515 actions. Nevertheless, the Written Decision contains extensive analysis (14 pages) and is reasoned in accordance with the evidence, the relevant law, and sound legal principles.

Ameritech Illinois filed a Response to 21st Century's Petition For Commission Review ("Response") which addresses most, if not all, of the Complainant's arguments

and sets out to correct many of the misstatements contained therein. This filing also sets out a number of additional evidentiary matters favorable to the Respondent which the Written Decision does not specifically mention, but which were considered in the assessment of this case.

II. The Petition for Review

This section highlights a few of the arguments that 21st Century set out in its Petition and explains why these assertions have no merit.

COUNT II

1. According to the Petition, an e-mail that 21st Century received from Ameritech Illinois on March 2, 2000 states that it will take steps to resolve certain of 21st Century's concerns, i.e., provisioning loops after hours and notifying 21st Century telephonically when such loops are provisioned. (Pet. at 7). The Petition argues that, in questioning the relevancy of this supposed resolution, the Written Decision fails to recognize that it was Ameritech who held out this agreement as a resolution of the issue when responding to 21st Century's emergency relief request. (Pet. at 7). The Petition also claims that the Written Decision ignores the fact that Ameritech failed to comply with the terms set out in its March 2nd e-mail and further argues that the Commission should reject the finding that this conduct was reasonable. (Petition at 6). It also maintains that the only reason notification is an issue at all in this proceeding is because of Ameritech's failure to comply with the March 2nd agreement. (Pet. at 10-11). 21st Century claims to be baffled by the Written Decision's statement that this resolution proposed by Ameritech "is outside the Complaint." (Pet. at 20). It further claims to be equally baffled by the Written Decision's suggestion that while Ameritech need not be held to the resolution it offered, the proposed resolution somehow shifted the burden to 21st Century to advise Ameritech that it was not complying with the resolution. (Pet. at 21). It is apparent from all these charges that 21st Century either fails to, or refuses to, grasp certain concepts fundamental to the bringing of a complaint.

It is well-settled law that a plaintiff may not recover on a theory that is not contained in its complaint. Schultz v. Schultz, 696 N.E. 2d 1169 (2nd Dist. 1998). As the courts have consistently held, "Proof without pleadings is as defective as pleadings without proof." (*Id.*) It is axiomatic that a party recover, if at all, on and according to the case it made for itself by its pleadings. (*Id.*) Stated another way, a Plaintiff cannot prevail after stating one cause of action and presenting a different one by proof. Gaiser v. Village of Skokie, 648 N.E.2d 205 (1st Dist. 1995). Each of these established principles was taken into account when the Written Decision set out the indisputable conclusion that the March 2nd e-mail and the evidence that flowed therefrom were "outside the complaint." (Written Decision at 25).

A thorough review of the Complaint filed in this case on March 9, 2000, showed that it contained no allegations relevant to, nor did it even mention, the March 2nd writing. The issues in a case are formed by the pleadings. Gault v. Sideman, 191 N.E. 2d 436. Hence, it was necessary to put the evidence of, and stemming from, the March 2nd correspondence into perspective. This particular evidence could not have been intended to show “unreasonableness” because the statements contained therein mitigate against the drawing of such an inference. In the end, the only reasonable way to have construed this issue and give it the effect that 21st Century desires, is to treat it as what it is; a new and separate claim not properly before the Commission. Here are the reasons.

From the evidence presented at hearing, it appears that 21st Century considered the March 2nd writing (if complied with) as a “resolution” of the Count II dispute. If, however, 21st Century truly believed that it was a resolution of the dispute (when issued on March 2nd) then it had no basis for bringing the complaint on March 9, 2000, i.e., the allegations under Count II were moot.

On the other hand, if the “resolution” did not resolve the dispute, then it is irrelevant, and the case proceeds, as it did, only on the original allegations of the Complaint (which does not in any way mention the March 2nd resolution). It bears mention, however, that the Complainant is the sole author of its pleadings and if it desired to bring an additional claim before the Commission, it needed to, and was certainly free to, amend its complaint. The fact remains that, for whatever reason, 21st Century did not amend its Complaint to include a claim based on the March 2nd correspondence.

The March 2nd resolution does not comport with Count II because, in reality, it is a new and different claim, arising, if at all, out of a completely new set of circumstances and involving a new time period. This requires the pleading of a new cause of action. Since 21st Century did not amend its Complaint to add this new claim, any evidence of Ameritech’s conduct to the extent that it grows out of the resolution, is irrelevant to the cause of action pled under Count II.

The rules of pleading are not mere technicalities that can be easily dismissed. They must be followed to ensure: (1) fairness in notice (what is being complained of); (2) fairness in process (what is being litigated and argued); and (3) orderliness in the building of a record (what evidence is pertinent to a particular claim). The proof of this need for proper pleading shows itself in this proceeding most particularly where 21st Century attempts to have the proposed commitments which Ameritech allegedly first offered on March 2nd apply ex post facto to situations that pre-dated this agreement. (See, e.g. Petition at 11 where 21st Century fuddles with the notification issue)

There is yet another reason, particular to the Section 13-515 complaint process, why any conduct following the March 2nd resolution is not actionable in this proceeding. Section 13-515 (c) plainly and flatly states that:

No complaint may be filed under this Section until the Complainant has first notified the respondent of the alleged violation and offered the respondent 48 hours to correct the situation. Provision of notice and the opportunity to correct the situation creates a rebuttable presumption of knowledge under Section 514.(220 ILCS 5/ 13-515 (c)).

Under the language of this Section, knowledge essential to the maintenance of a Section 13-515 action will not be presumed without actual notice to the Respondent. The Commission has no authority to waive the requirements of this provision. This lack of statutorily mandated notice of any wrongdoing pertinent to the March 2nd resolution is pointed out on page 33 of the Written decision. In short the Written decision makes no determination whatsoever as to Ameritech Illinois' conduct subsequent to March 2nd because that situation has not properly been put before the Commission.

Because 21st Century did not withdraw its original Count II allegations or amend its complaint in any way the Written Decision addresses the relevant evidence and properly states a finding relative only to those allegations. It looks at the March 2 letter put into evidence by 21st Century as nothing more than a willingness on the part of Ameritech to work out some of the concerns which are set out in Count II of the Complaint. Finally, it treats the evidence of conduct subsequent to the March 2nd resolution as "outside the complaint" and premature for an independent cause of action. This is what the law requires.

2. As a matter of law, the Petition claims that the Written Decision fails to mention that 21st Century also asserted violations of Sections 13-514 (2), (4), and (8) in addition to subsection (6) violations. (Petition at 7-8). It does not tell the Commission, however, that 21st Century first and only asserted such violations in its Reply Brief - the last word offered by any party to this proceeding. This is patently unfair. In the first place, the violations alleged should have been pled in the Complaint in order to apprise both Ameritech and the trier of fact and give fair notice of the legal underpinnings of the case. Waiting to bring a legal theory in an initial brief (as 21st Century did with respect to subsection (6)) is itself highly irregular and prejudicial. Here, 21st Century waited until the very last possible moment to identify additional legal claims - which left Ameritech no opportunity to respond through either evidence or argument. This type of unfairness has due process implications and cannot be condoned by the Commission.

3. Further in this regard, 21st Century fails to tell the Commission that even in its Reply Brief (in this expedited proceeding), 21st Century did little more than just set out the prohibited actions as a way of introduction. (See, 21st Century Reply Brief at 2). Nevertheless, and regardless of 21st Century's failure to discuss any of the facts which would lend themselves to any of the Section 13-514 violations, the Hearing Examiner studied the entirety of the statute and the whole of the record before issuing the Written Decision.
4. Contrary to 21st Century's accusation, the Written Decision does not conclude that Ameritech's electronic reports are superior to 21st Century's manual reports simply as a matter of the form of presentation. (Petition at 12). It is the substance, and only the substance, of the respective reports that figured in the decision. Neither from 21st Century's testimony nor from its reports or workpapers is it possible to ascertain how its numbers were derived except that they wrongfully take no account of electronic completion notice.
5. 21st Century tries to build its case by taking selective statements in the Written Decision and putting them into a new context. (Petition at 17, 19, 5). This is patently unfair and unproductive.
6. The Written Decision does not "summarily" accept Ameritech's method of calculating due dates met. (Pet. at 10). It does recognize, however, that these reports are provided to the Commission and to 21st Century on a monthly basis and that any dispute as to how Ameritech calculates its numbers surely predated this case and could have been addressed prior to, and outside of, this proceeding. This is not the proper forum for such a far-reaching assessment which exceeds the proper scope of this two-party docket. More to the point, 21st Century's own performance reports were not up to the task of supporting its contentions for each of the two independent reasons discussed in the Written Decision.
7. 21st Century's contention that the Written Decision concludes "that Ameritech need not provide notice to 21st Century of order completion" is fabricated out of whole cloth. (Pet. at 12). This was not a material issue in the case and no such conclusion ever was reached.
8. Equally wrong and baseless is 21st Century's claim that while the Written Decision relies on Mr. Cate's allegations, he did not identify a single order that was included in 21st Century's performance reports as late. (Pet. at 13). This is untrue. Mr. Cate identified several orders which, in later testimony, 21st Century admitted should not have been counted as missed. Moreover, 21st Century's performance reports were neither explained nor structured to allow for any independent assessment. See, Written Decision at 26-27.

9. According to 21st Century, “the Written Decision agrees with Ameritech that it need provision loops to 21st Century only as frequently as it timely provisions loops to other CLECs.” (Pet. At 15). It is impossible to discern from where 21st Century gets this notion. Simply because the Written Decision took note of all the available comparisons on record (which it surely would be remiss in not doing) does not mean that it reached a conclusion on the basis that 21st Century would incorrectly attribute to it. It does not seem possible that 21st Century could be so confused.

Notably, the many legal principles which flesh out pages of 21st Century’s Petition are not applied or construed along with any of the evidence and for good reason. (Pet. at 13, 15, 17). There are no facts which lend themselves to 21st Century’s position. The Written Decision, however, has applied the law to the facts (including the Ovations Order finding urged by 21st Century) and on this basis found that the comparison between 21st Century and retail customers, (even using Complainant’s questionable reports) shows no discrimination. 21st Century, thus, states no legitimate complaint with the Written Decision.

COUNT III

10. 21st Century’s Petition dwells on Ameritech’s past behavior, particularly on the undisputed fact that Respondent initially refused to address the AXT problem because of a belief that it was not legally required to provision loops in buildings subscribing to its AXT service. (Petition at 23). 21st Century alleges that the Written Decision somehow condones this conduct. (Id.) Not only are 21st Century’s claims unsupported, but it fails to comprehend that this particular conduct has been made irrelevant by virtue of Ameritech’s subsequent actions and by the particular and limited type of relief which Section 13-515 offers.
11. A Section 13-515 complaint is not an action for damages, as even 21st Century itself recognizes. (21st Century Reply Brief at 26). Indeed, subsection (d) (7) specifies that the only relief available where a violation of Section 13-514 is found, is “directions and a deadline for correction of the violation.” 220 ILCS 5/13-515 (d)(7). This is an authorization for granting prospective performance-type relief. As such, past conduct, however egregious, is not actionable under Section 13-515 if it has been corrected or is being corrected by the Respondent prior to or at the time of the filing of the complaint. Indeed, if the wrongful conduct is already corrected, the provision for “directions and a deadline” would be rendered meaningless. It is a long-settled rule that if the language of a statute is plain and unambiguous, the sole function of a court is to enforce it according to its terms. Camiretti v. U.S., 242 U.S. 470 (1917). Further, no clause, sentence or word shall be construed as superfluous, void, or insignificant if a construction can be found which gives force to and preserves all the words of the statute.

12. In the same vein, each of the prohibited actions set out in Section 13-514, including the prohibition described in subsection (6) of the statute, on which 21st Century initially and consistently relies, is framed in the active present voice and not the past tense. (See, Section 13-514 (6) language which states the violation of "unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers.").
13. 21st Century wrongfully claims that the Written Decision finds justification for Ameritech's dissimilar treatment of 21st Century and its end use customers in a manner contrary to the Commission's conclusion in the Ovations Order. (Pet. at 28). Although 21st Century has raised the Ovations Order at other times in this proceeding, it has never provided any meaningful discussion of this case or context for the one finding on which it relies.

In order that the Commission be fully and reasonably apprised in the matter, the following illustration and analysis is here provided.

It is a well settled rule that Commission orders are not res judicata. Mississippi River Fuel v. ICC, 116 N.E. 2d 394. But that principle is not even important here.

There are substantial factual differences between this case and those at issue in the Ovations case, such that the Ovations Order's finding is inappropriate authority for present purposes.

Constant

Variable

Ovations case:

Retail customers	special services	Tariff - Price Z
Ovations customer	special services	No tariff - Price Y or Z
Other CLECs	special services	No tariff - Price Y or Z

In the Ovations Order, the Commission considered the contentions that Ameritech discriminates against Ovation in the assessment of special construction charges for which it has no parameters or standards. (Ovations Order at 17). It rejected the notion that Ameritech can assess special construction charges on Ovation and all competitive LECs without regard to its retail customers - so long as it treats all competitive LECs the same. (Id.) Simply put, this case and the Order dealt with Ameritech's overt conduct.

The 21st Century Complaint:

21 st Century customer (no AXT bldg.)	telephone service	No additional work
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21 st Century customer (AXT bldg.)	telephone service	Add'l work (add Axt)
Retail customers (AXT bldg.)	telephone service	No additional work
Building customer	AXT subscriber	

The difference between a retail customer and a 21st Century customer, and all that this entails in the AXT situation, is illustrated above. It shows that Ameritech Illinois took no active steps to discriminate, but found itself dealing with a unique and dissimilar situation put in place long ago way before the onset of competition. Any discrimination, if it exists, is inherent in the physical situation - and not as a result of any purposeful conduct i.e., unlawful discrimination. This is the point which the Written Decision sets out at page 35.

The record shows that the AXT customer is the building and not the tenant in the building. As such, AXT is not part and parcel of regular telephone service which can be switched from Ameritech to 21st Century through normal and standard procedures. It requires the technician to have knowledge of the underlying situation in order not to cause a disconnect of the AXT when servicing 21st Century's orders.

AXT service, properly called "Lobby Interphone Service for Multiple Apartment Buildings", was sold to building owners prior to April 16, 1981. According to Mr. Suthers' testimony, Ameritech Illinois' records indicate that there are possibly 58 buildings with AXT service, although its central office records are not updated when a building cancels this service. Hence, a visual check was required, and was being performed to see what buildings still had AXT service. (Suthers testimony at 4). Along with the technically prescribed field test, it required the development of new standards and procedures to guide Ameritech technicians in the task.

The AXT problem does not result from a calculated difference in treatment; it arises because the situation, independent of any Ameritech conduct, is plainly dissimilar. Hence, the Ovations Order which speaks to a different set of facts and circumstances bears no relevancy to this case.

14. The Commission is advised to disregard 21st Century's claim that if it had not filed the instant complaint, there would have been no real attempt by Ameritech Illinois to resolve the AXT problem. (Pet. at 8). The record shows that (1) Ameritech reversed its initial legal position on the AXT situation without any legal action; (2) Ameritech, assisted in the task by 21st Century, performed a field test of unusual complexity in order to determine technical feasibility, without any legal action; and (3) Ameritech went about discovering the limitations of its database system without any legal action. It is clear from the record evidence that none of this activity by Ameritech was initiated due to the filing of this complaint - each was an activity that pre-existed this filing. It is impossible to

review this record and not see that time, effort and expense were invested in the AXT problem by Ameritech Illinois prior to the filing of the instant Complaint.

15. 21st Century maintains that Ameritech's "initial reaction" was a deliberate refusal to provision loops in buildings subscribing to AXT and that the Written Decision condones this conduct. (23). Nothing prevented 21st Century from taking legal action at that time when , arguably, Ameritech Illinois' conduct might have been actionable. The instant complaint, however, was filed on March 9, 2000, long after Ameritech Illinois reversed its position (on its own and without any legal action).
16. 21st Century suggests that even if Ameritech Illinois now has resolved the AXT problem, the Commission nevertheless should grant the complaint and direct the Respondent to provision loops timely and properly to buildings with AXT service on speculation that Ameritech might "backtrack" or that its methods "might not work." A complaint cannot and should not be granted where proof of the violation is insufficient and certainly not on the basis of idle speculation. The action 21st Century urges is not warranted on either the facts or the law.
17. The Petition maintains that an e-mail document shows that Ameritech Illinois first directed its Staff to begin production of the standards and methods for including AXT service provisioning on March 6, 2000. It fails to consider, however, that the field test it ran to determine technical feasibility was completed only on March 2, 2000 - four days earlier and that this action was surely a prerequisite to the development of such procedures.
18. All in all, 21st Century would have Ameritech-Illinois be held to a standard of perfect performance, a standard unrealistic in any type of business situation. The law, however, intends only to address "unreasonable" conduct" and, under the prohibition of Section 13-514 (6) on which 21st Century relied, requires a showing of "substantial adverse effect." 220 ILCS 5/13-514. The evidence of record simply does not meet the legal test.

III. Conclusion

A Petition should point out evidence that is overlooked or reasoning that is flawed. It is highly exhausting to respond to each and every point that 21st Century sets out in its Petition primarily because it does not treat the Written Decision either fairly or straightforwardly. Suffice it to say that there is no legitimate legal or factual error being brought before the Commission by the Petition in this case. Accordingly, the recommendation must be for the Commission to deny the Petition and enter the Written Decision as its Order in this case.

IV. Proposed Language

Prior to the “Analysis and Conclusion” section of the Written Decision (Section V. at page 24) there may be inserted the following:

V. 21st Century's Petition For Review of Written Decision and Ameritech Response.

In its Petition for Commission Review of the Hearing Examiner's Written Decision ("Petition"), 21st Century argues, with regard to Count II, that Ameritech Illinois' performance reports should not have been relied on; (Petition at 9, 12) that the telephonic notification measure Ameritech agreed to implement on March 2, 2000 should have been considered determinative of the issue; (Petition at 10-11) and that under the law, Ameritech should not be permitted to discriminate against 21st Century by provisioning loops in an untimely manner with the justification that it treats all CLECs equally, as the written Decision would allow. (Petition at 15).

As to Count III, 21st Century argues that Ameritech purposefully and deliberately avoided addressing the AXT problem, as is evidenced by the fact that it believed that it was not legally required to provision unbundled loops in buildings subscribing to AXT service; (Petition at 21) that 21st Century was compelled to file this Complaint because it could not rely on Ameritech Illinois to resolve the issue; (Petition at 22) and even though the problem may now be resolved, it is possible that Ameritech Illinois may "back-track" on its obligations. (Petition at 24).

Ameritech Illinois filed a Response to 21st Century's Petition for Commission Review ("Response") in which it addresses each of these assertions. It notes the independence of the Written Decision in weighing all of the evidence on the Count II allegations (Response at 2-3), and further points out the numerous misstatements of fact in the Petition (Response at 6, 7, 8, 14, 16 and 23) as well as 21st Century's misapprehension of both the law (Response at 14, 19 and 22), and the analysis set out in the Written Decision (Response at 3, 5, 12, 15 and 20-22).

On the Count III cause of action, Ameritech contends that the evidence shows that it was willing to, and did, take meaningful steps to solve the AXT problem (Response at 23-25) and that the timeline of its resolution of the AXT problem was not unreasonable. (Response at 26-27). It further maintains that the AXT problem was never as simply as 21st Century would have the Commission believe. (Response at 27). Finally, Ameritech maintains that the record shows that the AXT problem is now resolved and there is no merit to 21st Century's assertions that the solution "might not work." (Id. at 31-32).

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